5526. Misbranding of "Cerebro-Spinal Nerve Compound." U. S. * * * v. Charles M. Simpson (Dr. C. M. Simpson's Medical Institute). Tried to the court and a jury. Verdict of guilty. Fine, $200 and costs. Judgment of conviction affirmed by the Circuit Court of Appeals. (F. & D. No. 6749. I. S. No. 4287–h.)

On October 20, 1915, the United States attorney for the Northern District of Ohio, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information in 2 counts against Charles M. Simpson, trading as Dr. C. M. Simpson's Medical Institute, Cleveland, Ohio, alleging shipment by said defendant, in violation of the Food and Drugs Act, as amended, on or about May 28, 1914, from the State of Ohio into the State of Minnesota, of a quantity of an article labeled in part, "Cerebro-Spinal Nerve Compound," which was misbranded.

Analysis of a sample of the article by the Bureau of Chemistry of this department showed that it consisted principally of alcohol, bromid, ammonium carbonate, and organic matter.

Misbranding of the article was alleged in the first count of the information for the reason that it contained 0.36 per cent of alcohol, and the package containing the article failed to bear a statement on the labels of the bottle and carton of the quantity or proportion of alcohol contained therein. It was alleged in substance in the second count of the information that the article was misbranded for the further reason that certain statements appearing on the carton, and certain statements included in the circular accompanying the article, falsely and fraudulently represented it as a treatment of all diseases which are really the result of diseases of the brain, spinal cord, medulla oblongata, the nerves given off from each of them, all nervous diseases and heart troubles; and as a valuable remedy for lost nervous strength, nervous prostration, spinal diseases, mania, melancholia, and neurasthenia; and as a remedy for dementia or acquired feeblemindedness, and katatonia or alternating insanity, when, in truth and in fact, it was not.

On November 20, 1915, the defendant entered a plea of not guilty to the information, and on November 29, 1915, the case came on for trial before the court and a jury. During the progress of the trial it was ordered that the first count of the information be dismissed, as will more fully appear from the following remarks by the court (Clarke, *D. J.*):

Gentlemen, I have concluded that the first count in this information should be dismissed. The charge is that goods shipped and delivered for shipment as aforesaid, said articles of drugs was then and there misbranded within the meaning of said act of Congress in that it contained 0.36 per cent of alcohol, and that the package containing the said article then and there failed to bear a statement on the labels of the bottle and carton of the quantity or proportion of alcohol contained therein.

You will see that in the count it is set out that the carton did contain a statement that this bottle contains about one-third of a drop of alcohol to each teaspoonful. Now, there has been no evidence to indicate that this statement of the quantity of alcohol is not correct, and of course, I assume that if it was not a reasonable approximation to the amount of alcohol which the analysis shows, counsel would have to have testimony. Therefore, it seems to me, under the state of the proof as it now is, the count is, to say the least, contradictory. The case will proceed on the second count.

The trial of the case was then resumed, and after the submission of evidence and arguments by counsel the following charge was, on November 30, 1915, delivered to the jury by the court (Clarke, *D. J.*):

Gentlemen of the jury, I am submitting this case to you upon the second count of the information only. In this count the Government charges that on the 28th day of May, 1914, the defendant, Charles M. Simpson, trading as Dr. C. M. Simpson's Medical Institute of the City of Cleveland, State of Ohio,

unlawfully shipped from the city of Cleveland, Ohio, to the city of St. Paul, in the State of Minnesota, 1 dozen bottles inclosed in cartons (which simply means pasteboard boxes) which contained an article designed and intended to be used for the cure and mitigation of diseases of man, and that these bottles or rather the pasteboard boxes in which they were shipped were branded or marked, and contained a circular within them and that upon the carton and circular were printed certain statements which were false and fraudulent as to the curative or therapeutic properties or contents of the bottles. "Therapeutic" is a word that is used in this count and has been frequently used in the testimony, and as used in this case it means simply healing or curative properties of any substance to which it may be applied.

Now, the statements appearing on the pasteboard box or carton which the Government charges were false and fraudulent are as follows, viz:

"Dr. C. M. Simpson's Cerebro-Spinal Nerve Compound, a valuable remedy for lost nervous strength and treatment of all diseases which are really the result of the diseases of the brain, spinal cord, medulla oblongata and the nervous diseases given off from each of them.

"Dr. C. M. Simpson's Remarkable Discovery for the treatment of all nervous diseases, also heart troubles * * * a most valuable remedy for nervous prostration, spinal diseases * * * melancholia, neurasthenia."

And the statements as to the therapeutic or curative effects of the substance contained in the bottles, which it is charged were printed in the circulars inclosed in the pasteboard boxes with the bottles are as follows:

"For * * * dementia, or acquired feeble-mindedness, katatonia or alternating insanity."

The charge of the Government is that these statements as to the curative properties of the substance which the defendant was selling were fraudulent and false and that the substances did not contain ingredients or medical agents effective among other things as a remedy for the diseases which the statements which I have read to you from the carton and from the circular contained.

The Government claims that these statements were not only false when thus used on the cartons containing the bottles and in the circular, but that they were made with the fraudulent purpose of inducing persons sick or afflicted with one or more of the diseases named, to purchase the so-called remedy so that the defendant might make money out of the sale of it.

The act of Congress under which this charge is being prosecuted is entitled "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes."

This is important legislation intended to protect the people so far as this case is concerned from the transportation and sale of misbranded medicines, experience having shown that men and women afflicted with disease are disposed to try a professed remedy, no difference how useless or even harmful it may be if it is strongly recommended, and it is to protect the sick and afflicted and people who are easily imposed upon, from fraudulent practices of the unprincipled and avaricious that this law was passed. It is a wise law and in proper cases should be rigidly enforced.

It is admitted by the defendant that the bottles in the pasteboard boxes or cartons were shipped from Cleveland to St. Paul, Minn., as charged in the information. It is also not questioned that the boxes or cartones had printed on them the language I have quoted to you from the information as constituting the charge of the Government against the defendant. The language which the Government charges was falsely and fraudulently used was not all that was printed upon the carton or in the circular, but the entire inscription is in evidence, and you may look to any other part of the printed matter to determine whether the language especially set out in this second count was or was not falsely and fraudulently used.

You will note, gentlemen of the jury, that before you can find the defendant guilty, you must find not only that the statements charged in the information were false, but that the defendant knew they were false when he used them, and that he used them for a fraudulent purpose. This is a criminal case and so the degree of proof that is necessary to convict the defendant is higher and greater than is sufficient in a civil case to support a verdict.

Before you can find the defendant guilty as charged in the information, you must be satisfied not by a preponderance of the evidence as in a civil case, but you must be satisfied beyond a reasonable doubt both that the statements set

out in the second count were false, and also that they were fraudulent. The burden of thus proving the defendant guilty beyond a reasonable doubt is on the Government.

The expression "reasonable doubt" seems to me to be so clear, plain, and exact an expression that to attempt to define or explain it is more likely than not to obscure its meaning. You all know that doubt as to how a case should be decided is an uncertainty of mind arising from the evidence introduced in the trial or the lack of evidence which may be necessary to create a clear conviction with respect to the guilt of the accused. Such a doubt springing from evidence, or from the lack of what you may think is necessary evidence, if honestly entertained, is a reasonable doubt such as is meant when the expression is used in this charge. This doubt, in order to justify your making it the ground of a verdict of acquittal, should be of such a character that it would require some evidence to remove it. It should not be a doubt raised by a mere whim, caprice, or prejudice on the part of a juror.

The rule is intended to be a shield for the innocent and not as a protection for the guilty.

The pasteboard cases or cartons with the inscriptions thereon and the circular which was in each of the cartons and which contained the statements, which are charged by the Government to be false and fraudulent, have been introduced in evidence and will be before you in your jury room.

The Government has produced a witness who has analyzed the contents of one of the bottles and has stated what he found as the result of his analysis. An analysis has also been made of the compound by a witness called by the defendant. So far as the curative properties of the compound are concerned, these two analyses do not differ substantially.

The Government has called physicians who have testified, as you have heard, that in their opinion the ingredients found in the bottle analyzed by the Government chemist are not effective as a remedy for the disorders which it is stated upon the label, and in the circular, and enumerated in the second count it is effective in the treatment of, and they have testified that in their opinion there is no single combination of substances or drugs which would be effective as a remedy for all of the diseases which are enumerated in the charge in this second count.

On the other hand, the defendant has called several witnesses who state that they have used the compound as a medicine and that it has proved in their cases effective as a remedy for the disorders with which they have stated to you they were afflicted. The question involved in this case is peculiarly one of professional learning and it is significant that not a single doctor has been called by the defendant. One young doctor was called as a witness but on preliminary examination he said he was not competent to testify as an expert physician upon the subjects involved in the case, and he was dismissed without testifying. This is a fact which you should take into consideration in arriving at your decision of this case.

Gentlemen, you will take all of this evidence into consideration and determine first of all whether the statements which are referred to in the second count and which I have read to you with regard to the therapeutic—that is, the curative properties of this preparation—were false, and in deciding this question you should take into consideration all of the evidence which has been produced by the Government, as well as that produced by the defendant.

If you find that the statements on the cartons and in the circulars which are set out in the second count were false, then before you can find the defendant guilty, it will be necessary for you to go further and consider whether such statements were fraudulently made. If you find beyond a reasonable doubt that the statements set out in this second count with respect to the curative properties of this compound were false, and that they were made with the fraudulent purpose of deceiving people, and so inducing them to buy the compound, then you should return a verdict of guilty. But if you find that these statements were not false, or that they were not made with the fraudulent purpose of deceiving people into purchasing and using the compound, then you should return a verdict of not guilty.

Gentlemen of the jury, you will be furnished with two forms of verdict, one finding the defendant guilty, and one finding him not guilty. You will fill in one of these forms of verdict as your decision of the case may render proper and have the verdict signed by your foreman and return it into court.

(Addressing counsel:) Gentlemen, have you any suggestions or exceptions?

(None.)

(Addressing jury:) You may retire and consider the case.

The jury thereupon retired, and after due deliberation returned a verdict of guilty on December 1, 1915, and the court sentenced the defendant to pay a fine of $200 and costs. On December 2, 1915, the defendant by his counsel filed his motion that the verdict of the jury and the judgment of the court be set aside and a new trial be granted, and on January 6, 1916, the said motion was overruled by the court.

On March 6, 1916, the defendant filed his petition for a writ of error and his assignment of errors, and on May 12, 1916, the order allowing the writ of error was entered and the case was sent to the United States Circuit Court of Appeals for the Sixth Circuit.

On March 16, 1917, the case was submitted to the said Circuit Court of Appeals for the Sixth Circuit, before Knappen and Denison, circuit judges, and Sater, district judge. On May 8, 1917, the case having come on for final disposition, the judgment of the lower court was affirmed, as will more fully appear by the following decision of the said Circuit Court of Appeals (KNAPPEN, *C. J.*):

Plaintiff in error was convicted, upon trial by jury, under an information charging the interstate shipment of certain drugs (in violation of the Food and Drugs Act, June 30, 1906, 34 Stat. 768, as amended by the act of August 23, 1912, 37 Stat. 416), alleged to be misbranded in that the label of the carton or package containing the drug (as well as a circular therein) contained false and fraudulent statements regarding the curative or therapeutic effect of the drugs. But two grounds for reversal are presented.

1. The first ground is that the information was insufficient in law. It was accompanied by affidavits of four persons relating in part to the actual shipment of the offending articles and the presence in the inclosed packages of the label and circular referred to, and in part to the chemical analysis of the drugs and the alleged falsity of the claims made as to their therapeutic effect.

The information was not sworn to, but states that the court was "given to understand and be informed upon the oaths of * * * whose affidavits are hereto attached and made a part hereof, as follows, to wit." Two of the affidavits were sworn to before notaries public. It is urged that the information was insufficient because not upon the oath of the prosecuting officer, but solely upon oaths of the witnesses by affidavit, and that oaths taken before notaries public were invalid.

We need not consider whether the objection would have been good had it been made in the court below. Defendant in fact pleaded not guilty to the information, without demurring or moving to quash, and the record does not indicate that the attention of the district court was ever directed to the alleged insufficiency of the information. Unless it was void, the question presented can not for the first time be raised in the appellate court, unless a refusal to so consider it would shock the judicial conscience. *Keliher* v. *United States*, C. C. A. 1, 193 Fed. 8, 10. Had there been no affidavit of witnesses, the information would not have been void for lack of the oath of the prosecuting counsel (*Weeks* v. *United States*, C. C. A. 2, 216 Fed. 292); and we do not regard the information as showing that it was filed without investigation by the district attorney (see *Frank* v. *United States*, C. C. A. 6, 192 Fed. 864, 867). The objection is purely technical and without merit, and was waived by pleading to the information without raising objection. *People* v. *Harris*, 103 Mich. 437; *People* v. *Turner*, 116 *Mich.* 390; *Bartlett* v. *State*, 28 O. St. 669. It is also urged that the information does not charge defendant with knowledge of the alleged false and fraudulent character of the representations made. We assume, for the purposes of this opinion, that such allegation is necessary. The gist of these representations, so far as need now be stated, is that the article was "a valuable remedy for lost nervous strength and treatment of all diseases which are really the result of diseases of the brain, spinal cord, medulla oblongata and the nerves given off from each of them." The information alleged that these representations were (omitting the words we have bracketed) "false and fraudulent in this, that the same were applied [by defendant] to said article knowingly, and in reckless and wanton disregard [on defendant's part] of their truth or falsity, so as to represent falsely and fraudulently to the purchaser thereof, and create in the minds of purchasers thereof an impression and belief that it was," etc The criticism we

are now considering would be fully met had the information actually contained (as it did not) the words above bracketed But the defect was not substantial; it was only formal. The information charged that the shipment was made by defendant "trading as Dr. C. M. Simpson's Medical Institute," and that the name of the article given on the label of the carton was "Dr. C. M. Simpson's Cerebro-Spinal Nerve Compound." The natural construction would be that it was defendant whose knowledge and reckless and wanton disregard of the truth was intended to be charged. The Federal statute (Rev. Stat., 1025) expressly provides that an indictment shall not be affected "by reason of any defect or imperfection in matter or form only which shall not tend to the prejudice of the defendant." *Rosen* v. *United States*, 161 U. S. 29; *Price* v. *United States*, 165 U. S. 311; *Tyomies Pub. Co.* v. *United States*, C. C. A. 6, 211 Fed. 385, 389. The rule applicable to an information is no less liberal. Its averments of facts constituting the offense need be only so certain and specific as fairly to inform defendant of the crime intended to be alleged, and as to make the judgment of conviction or acquittal thereon a complete defense to a second prosecution of the defendant for the same offense. *United States* v. *Hess*, 124 U. S. 483, 486, 487; *Stokes* v. *United States*, 157 U. S. 187; *Bennett* v. *United States*, C. C. A. 6, 194 Fed. 630. 632; *Hocking Valley R. R. Co.* v. *United States*, 210 Fed. 735. It is clear the information fulfilled these requirements.

That the criticism urged is purely technical and without merit, in that defendant understood that his own intent was in issue, is affirmatively shown by the fact that at the opening of the trial defendant admitted that he made the shipment in question; that it contained the cartons, bottles, and wrappers exhibited in court, and that he was the proprietor and sole owner of the "Dr. C. M. Simpson Institute"; and by the fact that as a witness in his own behalf, and under examination by his own counsel. he testified directly to the absence of intentional false branding and fraudulent intent. It is finally urged that the information does not show that the alleged misrepresentations were in the "ultimate container," that is to say, in the package as it reaches the consumer. *McDermott* v. *Wisconsin*, 228 U. S. 115, 130. This objection, as well as the preceding ones, must be considered in the light of the fact that the question was not raised below. We think the information should fairly be interpreted to mean that the misrepresentations were intended to accompany the bottles into the hands of the consumers. It is alleged that the shipment consisted of "certain packages," and that the packages contained the circular or pamphlet later described therein; that one of the alleged misrepresentations appeared "on the label of the carton aforesaid," and that the other was "included in the circular or pamphlet aforesaid." It is a matter of common knowledge that proprietary medicines in bottles are usually sold to the consumer in cartons, and that the latter usually contain circulars or other advertising matter. We are not impressed with the suggestion that the circular was charged to have been inside "the article of drugs."

2. The remaining complaint is addressed to the denial of the defendant's motion to direct verdict in his favor. We think the motion was properly denied. It seems unnecessary to set out in full the exact language of the representations alleged to be contained in the packages. It seems enough to say that defendant's compound was not only represented generally to be a valuable remedy for the treatment of all diseases "resulting from diseases of the brain, spinal cord, and medulla oblongata, and the nerves given off from each," "a remarkable discovery for the treatment of all nervous diseases," but also a "remarkable discovery for heart troubles," as well as a "most valuable remedy for nervous prostration, mania, melancholia, and neurasthenia." There was substantial testimony from competent medical witnesses that there was no remedy applicable to all the diseases mentioned; that medical science and medical experience furnish no support for the broad claims made for defendant's remedy; that "there is no one medicine that will prove a valuable remedy for all" the diseases enumerated. There was further substantial testimony from competent witnesses that bromides, which constitute a prominent ingredient in defendant's remedy, are sedative in their nature and in ordinary doses, not stimulating; that while thus helpful in quieting an exalted or excited state of the nerves, as in many cases, including some cases of mania, they are not only [not] helpful, but are positively injurious in depressed conditions, as in melancholia; that there is no one remedy for all spinal diseases, nor for all cases of neurasthenia, or heart trouble, nor for all cases of melan-

cholia or of mania; that some diseases of the heart require sedatives, others stimulants; that the same is the case with neurasthenia and certain other nervous diseases mentioned; and that in some cases of nervous prostration and other nervous affections the administering of sedatives or depressants is harmful; that bromides are not suitable to the treatment of the mentally and physically depressed. There was further testimony to the same effect as to others of the diseases included, either specifically or by general description, in the claims made for the remedy; also that defendant's compound was dangerous to intrust to the hands of a layman. Aside from defendant's own testimony, there was no competent medical testimony in opposition to that presented by the Government, to the effect that the claims made for the medicine were contrary to all medical science. The defendant's proposition that the presence of ammonium-carbonate neutralized the effect of the bromides as depressants was denied by medical witnesses for the Government. True, it appeared beyond dispute that bromides are beneficial, at least as a palliative in quieting the nerves and inducing sleep, in ordinary cases of nervous excitability; and there was testimony on the part of the defense that several persons had received benefit, indeed, many of them claimed to have been cured, by the use of defendant's remedy. But such testimony, at the most, bore only upon the question of fact whether the alleged representations were, as made, false and fraudulent. There was still room for a conclusion that substantial mischief resided in the claim of a universally efficacious remedy for the numerous and widely prevalent maladies; for the term "remedy" must at least imply a curative tendency, although not of course guaranteeing a cure. The defendant was a graduate physician, and the jury were justified, under all the evidence in the case, in presuming that he knew the falsity of the broad claim made for his compound.

The brief of defendant's counsel criticizes the admission of certain testimony, although we do not understand that such admission is relied on for reversal. We may say, however, that we have examined all the criticisms which are made the subject of either exception or assignment, and find no error.

The judgment of the district court is accordingly affirmed.

CARL VROOMAN, *Acting Secretary of Agriculture.*